



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 978 OF 2014**

**DENNIS NGUMI GITACHU.....CLAIMANT**

**VERSUS**

**SIDAL AFRICA LIMITED.....RESPONDENT**

*(Before Hon. Lady Justice Maureen Onyango)*

**RULING**

By Notice of Motion Application dated 25<sup>th</sup> May, 2018 and filed in Court on 30<sup>th</sup> May, 2018 the applicant Robert Ngumi Gitachu, who is the Claimant in the main suit seeks the following orders that;-

1. The Consent order entered on 24<sup>th</sup> April .2018 be set aside, vacated and/or discharged and the parties be allowed to proceed to trial.
2. The cost of this Application be paid by the Respondent.

This Application is premised on the grounds that –

- a) On 24<sup>th</sup> April 2018, the parties entered into a consent order, that the Defendant do pay Kshs.600,000.00 as three months notice and Kshs.93,333.00 on accrued leave.
- b) The parties were to enter a final consent order on 9<sup>th</sup> May 2018.
- c) When the parties appeared on 9<sup>th</sup> May 2018, the Respondent sought more time, which the Claimant saw as a way of delaying the proceedings, and therefore opposed.
- d) The Court ordered parties to mention the matter on 15<sup>th</sup> May 2018 before the Registrar for purposes of taking a hearing date and recording a consent if any.
- e) On 15<sup>th</sup> May 2018 when the parties appeared before the Registrar the Respondent was silent on settlement.
- f) The Respondent has not shown any willingness to finalise the matter through negotiation
- g) The consent recorded on 24<sup>th</sup> April 2018, was not in good faith on the part of the Respondent.
- h) The Respondent's intention was to avoid payment of any interest that may accrue out of the amount on the said consent order.
- i) The purpose of settling out of Court is to facilitate the process and have speedy recovery.
- j) The parties have now resulted to trial on the remaining unsettled items.
- k) It will be unjust on the part of Respondent to benefit on an order obtained through mischief.

l) It is therefore in the interest of justice that the order recorded on 24<sup>th</sup> April 2018, be vacated and parties be allowed to proceed to trial on the entire case.

The Application is supported by the Affidavit of **ROBERT NGUMI GITACHU** sworn on 25<sup>th</sup> May, 2018 and on the grounds on the face of the motion.

On 13<sup>th</sup> June 2018 the Respondent filed Grounds of Opposition to the Application dated 25<sup>th</sup> May 2018. The Respondents raises the following grounds:

1. The Application is bad in law, misconceived and incompetent.
2. The Application has no merit.
3. The Application is meant to mislead the Court.
4. The Application is an abuse of the Court process the applicant having filed an appeal against the very same judgment it purports to review.
5. The Applicant has not demonstrated any grounds that would support the setting aside of a consent order.

The Respondent additionally filed a Replying Affidavit dated and filed in Court on 12<sup>th</sup> October 2018 sworn by CAROLINE WAITUIKA, the Human Resource Manager of the Respondent Company, in which she avers that the instant Application has no merit and should be dismissed with costs to the Respondent.

She further avers that the consent in this matter was arrived at following lengthy negotiations leading to filing of the consent in Court. The Respondent further avers that subsequent to the consent it has commenced processing of the payments as evidenced by the cheques drawn in favour of the Claimant herein.

It is contended that the consent was recorded in good faith and the payment cheques are available for collection by the Claimant herein and that if there is any bad faith it is from the Claimant herein and not her (the Respondent).

In disposing of the instant Application, the parties agreed to file written submissions.

#### **Claimant/Applicant's Submissions**

It is submitted on behalf of the Claimant/Applicant that the instant Application ought to be allowed as prayed and parties do proceed for hearing and determination of the case on merit.

The Claimant further submitted that the law on setting aside consent is clear and that the same may be set aside if obtained by fraud, collusion or by an agreement contrary to the policy of the Court or if the consent was given without sufficient material facts or in general for a reason which would enable the Court to set aside an agreement as highlighted in the case of **Civil Appeal No. 293 of 2014 Board of Trustees National Social Security Fund Vs Micheal Mwalo** where the Court in quoting the case of **Birket Arcon Business Machines Limited (1999) 2 ALL ER 429** held:

*“If a transaction was on its face manifestly illegal, the Court would refuse to enforce it, whether or not either party alleged illegality. If a transaction was not on its face manifestly illegal but there was persuasive and comprehensive evidence of illegality, the Court might not enforce it even if illegality had not been pleaded or alleged. The principle behind the Court’s intervention of its own notion in such a case was to ensure that its process was not being abused by an invitation to enforce sub silentio a contract whose enforcement was contrary to public policy.”*

The Claimant further submitted that he entered into the consent on the basis of the whole claim being settled out of court and did not expect some issue to be determined through trial. It is further submitted that the Respondent created the perception that the claim would be settled entirely out of Court thus the consent was fraudulent and was obtained after misrepresentation of facts by the Respondent herein thus can be rescinded. To fortify his argument the Claimant relied on the Authority of **MusePrime Properties Vs Adhill Properties (1990) 36 EG 114**.

The Claimant contends that the Respondent’s intention in the partial consent was to avoid payment of interest of the intended sum thus her (the Respondent’s) actions are an illegality. It is further stated that the Claimant did return the cheque drawn by the Respondent as the matter is still pending before this Court. It is the Claimant’s submission that the consent in this matter was obtained through misrepresentation and non-disclosure of material facts that makes the same voidable.

The Claimant urged the Court to set aside the consent and that parties do proceed to hearing of this matter on merits and that the Respondent will not be prejudiced in any way should the Orders sought in the Application be allowed.

#### **Respondent's Submissions**

It was submitted by the Respondent that on 24<sup>th</sup> April 2018 when this matter was scheduled to proceed for hearing parties entered into a partial consent as recorded in Court on the said date.

Subsequent to the consent being recorded the Claimant filed the instant Notice of Motion Application seeking to set aside the consent entered on 24<sup>th</sup> April, 2018.

The Respondent further submitted that the law on setting aside consents is well settled and that for the instant case the Claimant has failed to meet the requirements as set out in the cases of **Board of Trustees National Social Security Fund Vs Michael Mwalo (2015) eKLR** and **SMN Vs ZMS & 3 Others (2017) eKLR**.

It is further submitted that the Claimant/Applicant had at all material times necessary to enter into the consent and has not provided any circumstances that would vitiate the contract.

In conclusion the Respondent urged the Court to dismiss the instant Application with costs to the Respondent as the same is void of merit.

### **Determination**

After considering the parties' arguments and the evidence adduced, I am of the opinion that there is only one issue for determination being whether the instant Application is merited or not.

From the proceedings of 24<sup>th</sup> April 2018 when the matter was scheduled to proceed for hearing before Abuodha J, M/S Githeiga was present for the Claimant alongside Mr. Munguti who was holding brief for Mr. Kiingati for the Respondent. The parties recorded a consent as below –

*“By Consent:*

*a) Claimant be paid three months' notice at Kshs. 600,000*

*b) The Claimant be paid Kshs. 93,333/-*

*c) Matter to be mentioned on 9<sup>th</sup> May 2018 for recording of final consent orders before any Judge.”*

Subsequently, when the matter was mentioned on 9<sup>th</sup> May 2018 before Court counsel on record for the Claimant informed the Court that a hearing date can be taken for the remaining issues as there was no consent to record, a fact which was confirmed by counsel for the Respondent.

The Court then directed that the matter be mentioned before the Deputy Registrar on 15<sup>th</sup> May 2018 for purposes of taking a hearing date.

The instant Application was thereafter filed seeking to set aside the consent of 24<sup>th</sup> April 2018.

From the wording of the consent duly recorded in Court as well as subsequent mention of this matter it is clear that the Claimant was aware that the consent was partial and is therefore estopped from claiming that material facts were not disclosed to him at the time of recording the same.

The law on setting aside consent is well settled. Having perused the Application and the Supporting Affidavit I am convinced that the Claimant has failed to prove that the consent was obtained by fraud or collusion to prompt this Court to set the said order aside. I am guided by the case of **Nairobi Civil Appeal 293 of 2014, Board of Trustees National Social Security Fund Vs Michael Mwalo (2015) eKLR**. In the case, the Court of Appeal after reviewing several authorities on setting aside of consent orders had this to say –

*“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”*

For the foregoing reasons, I find no merit in the application and dismiss with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**